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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. JOSE LUIS LOPES FONTENOT, Defendant and Appellant.	D074575 (Super. Ct. No. FBA1100269)

APPEAL from a judgment of the Superior Court of San Bernardino County, Lisa M. Rogan, Judge. Conditionally reversed and remanded.

Patricia L. Brisbois, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Julie L. Garland, Senior Assistant Attorney General, Meredith White and Tami Falkenstein Hennick, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Jose Luis Lopes Fontenot of the first degree murder of his stepfather, J.H., in 2011, and it found true the allegation that he intentionally and

personally used a firearm in the commission of the crime. (Pen. Code,[1] §§ 187, subd. (a); 12022.53, subd. (d); count 1.) A jury also convicted Fontenot of second degree murder and found true the allegation that he intentionally and personally used a firearm in the commission of the 2009 murder of G.B. (§§ 187, subd. (a); 12022.53, subd. (d); count 2.) He was a juvenile when he committed the crime. The trial court sentenced Fontenot to life without the possibility of parole for the first degree murder conviction (count 1), then 25 years to life consecutively for the firearm enhancement. It stayed a sentence of 15 years to life for the second degree murder conviction (count 2), but imposed 25 years to life consecutively for the firearm enhancement. The court also imposed a $10,000 parole restitution fine. (§ 1202.4, subd. (b).)

On appeal, Fontenot asserts: (1) he never received a hearing to determine if the 2009 murder should have been handled by the juvenile court; (2) the firearm enhancement sentences must be reconsidered in light of the Legislature's amendments to section 12022.53, subdivision (h), giving the court discretion in applying the enhancement; (3) the sentence imposed for the count 2 firearm enhancement must be stayed; and (4) the court improperly imposed a parole restitution fine. Fontenot also seeks corrections to the abstract of judgment.

We agree that Fontenot must be given a juvenile transfer hearing, and we conditionally reverse and remand the count 2 conviction for the 2009 murder on that

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1 All statutory references are to the Penal Code unless otherwise specified.

basis. As we explain, our conclusions regarding the remaining contentions depend on the outcome of the juvenile transfer hearing.

FACTUAL AND PROCEDURAL BACKGROUND

In May 2011, Fontenot was charged in count 1 with the murder of his stepfather, J.H., in violation of section 187, subdivision (a), and with personally and intentionally discharging a firearm. (§§ 12022.53, subds. (b)-(d), 1192.7, subd. (c)(8), 667.5 subd. (c)(8)). While Fontenot was in custody, police learned Fontenot was also responsible for the 2009 homicide of G.B., when Fontenot was 17 years and four months old. In November 2011, Fontenot was charged in count 2 with G.B.'s murder and with personally and intentionally discharging a firearm. (§§ 12022.53, subds. (b)-(d), 1192.7, subd. (c)(8), 667.5 subd. (c)(8).) He was also charged with a multiple murders special circumstance that would warrant a sentence of life in prison without the possibility of parole if found true. (§ 190.2, subd. (a)(3).)

Trial eventually commenced in August 2016.[2] In September 2016, a jury found Fontenot guilty of second degree murder on count 2 and found true that Fontenot personally and intentionally discharged a firearm, causing death to G.B. The jury deadlocked on count 1, and the court declared a mistrial on that count.

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[2] The length of time between the charges being filed and commencement of the first trial was due, in part, to psychological testing to determine Fontenot's competence to stand trial. The court ordered psychological evaluations in 2011 and found Fontenot competent to stand trial in August 2012. It ordered additional evaluations in June and July 2014, and in February 2016. The court found Fontenot competent to stand trial again in April 2016.

In February 2017, Fontenot was retried for the count 1 murder, along with special allegations of multiple murders and the personal and intentional discharge of a firearm in the commission of the crime. The jury found Fontenot guilty of first degree murder and found both special allegations true.

At sentencing, the court considered the *Miller v. Alabama* (2012) 567 U.S. 460 factors. It found both homicides involved a high degree of cruelty, viciousness, and callousness. When the court contemplated consecutive sentencing, it noted the murders did not occur during a single period or in the same place. The court found Fontenot ineligible for probation, and it ordered a restitution fine pursuant to section 1202.4 and a parole revocation restitution fine, to be stayed permanently. After the defense attorney said he did not think a parole restitution fine could be imposed at all, the court said, "Okay. I will not impose it." Then the defense attorney offered, "It can be imposed to Count 2, but not Count 1," and the court said, "Yes."

The court sentenced Fontenot to life without the possibility of parole for count 1 and an additional 25 years to life, to be served consecutively, for the firearm enhancement. It sentenced Fontenot to 15 years to life for count 2, which the court stayed "consecutive to the above." The court also applied a firearm enhancement to the second count, for 25 years to life, and stated the total prison commitment would be life without the possibility of parole, consecutive to 50 years to life for the firearm enhancements.

DISCUSSION

A. Juvenile Transfer Hearing

In 2011, consistent with Welfare and Institutions Code sections 602 and 707, subdivision (d)(1), Fontenot was charged in criminal court for the 2009 murder of G.B., which he committed when he was 17 years and 4 months old. In November 2016, the electorate passed Proposition 57, the Public Safety and Rehabilitation Act, which prohibits a prosecutor from charging a juvenile in adult court with a crime. (*People v. Superior Court* (*Lara*) (2018) 4 Cal.5th 299, 303 (*Lara*).) Fontenot's second trial on count 2 began in February 2017, after Proposition 57 became effective. Under Proposition 57, if a defendant was a juvenile at the time of the crime, the prosecutor must commence the action in juvenile court. (*Ibid.*) The juvenile court conducts a transfer hearing to determine if the matter should remain in juvenile court or transfer to adult court. (*Ibid.*) Fontenot contends he should have received this transfer hearing. We agree.

The retroactive application of a statute to an existing case is reviewed de novo. (*In re Marriage of Fellows* (2006) 39 Cal.4th 179, 183.) In 2018, our Supreme Court concluded the right to a juvenile transfer hearing applies retroactively because the transfer provision is an " 'ameliorative change[ ] to the criminal law' that we infer the legislative body intended 'to extend as broadly as possible.' " (*Lara, supra,* 4 Cal.5th at p. 309.) The juvenile court considers a variety of factors, such as "the minor's maturity, degree of criminal sophistication, prior delinquent history, and whether the

minor can be rehabilitated. (Welf. & Inst. Code, § 707, subd. (a)(1).)" (*People v. Vela* (2018) 21 Cal.App.5th 1099, 1103 (*Vela*).)

To ensure compliance with Proposition 57, we follow the procedure outlined in *Vela*: "[The juvenile]'s conviction and sentence are conditionally reversed, and we order the juvenile court to conduct a juvenile transfer hearing. ([Welf. & Inst. Code,] § 707.) When conducting the transfer hearing, the juvenile court shall, to the extent possible, treat the matter as though the prosecutor had originally filed a juvenile petition in juvenile court and had then moved to transfer [the juvenile]'s cause to a court of criminal jurisdiction. ([Welf. & Inst. Code,] § 707, subd. (a)(1).) If, after conducting the juvenile transfer hearing, the court determines that it would have transferred [the juvenile] to a court of criminal jurisdiction because he is 'not a fit and proper subject to be dealt with under the juvenile court law,' then [the juvenile]'s convictions and sentence are to be reinstated. (([Welf. & Inst. Code,] § 707.1, subd. (a).) On the other hand, if the juvenile court finds that it would *not* have transferred [the juvenile] to a court of criminal jurisdiction, then it shall treat [the juvenile]'s convictions as juvenile adjudications and impose an appropriate 'disposition' within its discretion." (*Vela, supra,* 21 Cal.App.5th at p. 1113; see *Lara, supra,* 4 Cal.5th at p. 310.)

Fontenot was not charged with G.B.'s murder until he was an adult, but he was 17 years old when he committed the crime. Because Proposition 57, applies retroactively, it applies to count 2. (*Lara, supra,* 4 Cal.5th at p. 309.) Thus, we conditionally reverse the conviction and sentence on count 2, and we order the juvenile court to conduct a juvenile transfer hearing. If the juvenile court determines that the

matter should have been addressed in juvenile court, the juvenile court shall impose an appropriate disposition for the conviction on the second count.[3] (*Id.* at p. 310.) However, if the juvenile court determines it would have transferred Fontenot to a court of criminal jurisdiction, the original conviction and sentence must be reinstated, and remanded to the trial court for resentencing, as we detail below. (Welf. & Inst. Code, § 707.1, subd.(a).)

B. Count 1 Special Circumstances

Fontenot contends that resentencing for the count 1 first degree murder depends on the outcome of the juvenile transfer hearing regarding count 2. We agree.

A person convicted of first degree murder is sentenced to the death penalty, life without the possibility of parole, or a prison sentence of 25 years to life. (§ 190, subd. (a).) For a sentence of death or life without the possibility of parole, special circumstances must exist. (§§ 190, subd. (a), 190.1, subd. (b), 190.2, subds. (a)(1)-(22).) Otherwise, a first degree murder conviction results in a prison sentence of 25 years to life. (§ 190, subd. (a).)

If the juvenile court retains jurisdiction over count 2, the conviction will be reversed. Absent the special circumstance from the conviction of multiple murders, the

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3 The juvenile system recognizes punishment as a rehabilitative tool. (*In re Teofilio A.* (1989) 210 Cal.App.3d 571, 575-576.) "There is no 'sentence,' per se, in juvenile court. Rather, a judge can impose a wide variety of rehabilitation alternatives after conducting a 'dispositional hearing,' which is equivalent to a sentencing hearing in criminal court." (*Vela, supra*, 21 Cal.App.5th at p. 1105.)

sentence for first degree murder would be limited to a prison sentence of 25 years to life. (§ 190, subd. (a).)

Here, the court imposed a sentence of life without the possibility of parole because of the count 2 conviction for second degree murder. Because a juvenile disposition is not a conviction (*Vela*, *supra*, 21 Cal.App.5th at p. 1105), if the juvenile court retains jurisdiction over the second count, the special circumstance prerequisite is no longer met. Accordingly, the trial court must resentence Fontenot on the first degree murder conviction. If the juvenile court concludes count 2 was appropriately tried in criminal court, there shall be no change to Fontenot's count 1 sentence of life without the possibility of parole.

Regardless of the outcome of the juvenile transfer hearing, the matter is remanded for resentencing on the firearm enhancement related to count 1, which we address next.

C. Firearm Enhancement

Fontenot contends the matter must be remanded for resentencing so the court may exercise its discretion in sentencing for the firearm enhancements. The Attorney General concedes the recent changes to section 12022.53 apply to Fontenot's case retroactively but contends the matter need not be remanded because there is no reasonable probability the trial court would have exercised discretion differently than the current sentence.

In January 2018, the Legislature's amendment to section 12022.53, subdivision (h) took effect. (§ 12022.53, subd. (h).) The amended provision gives the trial court discretion under section 1385 to strike or dismiss a section 12022.53 firearm enhancement, possibly reducing the punishment. (See *ibid.*) Because it is ameliorative,

the amended law is retroactive to nonfinal judgments. (*People v. Chavez* (2018) 22 Cal.App.5th 663, 712 (*Chavez*).) In such instances, unless the record clearly indicates the trial court would have reached the same conclusion even had it been aware of its discretion, a case should be remanded for resentencing. (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391.)

Here, when the court applied the firearm enhancement of 25 years to life, doing so was mandatory under section 12022.53, subdivision (d). Though the court discussed aggravating circumstances and found both homicides involved a high degree of cruelty, viciousness, and callousness, nothing in the record indicates whether, given discretion, the court would have imposed the sentencing enhancements for discharging a firearm. Thus, we remand the matter for resentencing so the trial court may exercise its discretion.

D. Count 2 Resentencing

Fontenot contends that because the court stayed the sentence for the substantive conviction of count 2 under section 654, it was required to stay the accompanying firearm enhancement. The Attorney General responds with two alternatives: the stay was a clerical error, correctable by the appellate court (*People v. Mitchell* (2001) 26 Cal.4th 181, 185), or it was an incorrect application of the law, requiring remand for resentencing. (*People v. Alford* (2010) 180 Cal.App.4th 1463, 1473.) We agree that the court incorrectly applied the law when it stayed the substantive conviction under section 654.

Section 654 provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the

longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." When section 654 applies, a court imposes sentences on both counts and stays the sentence for one. (*People v. Alford, supra,* 180 Cal.App.4th at pp. 1470-1471.) The stayed sentence becomes permanent once the sentence for the first count is complete. (*People v. Green* (1979) 95 Cal.App.3d 991, 1008.) However, " 'the limitations of section 654 do not apply to crimes of violence against multiple victims.' " (*People v. Oates* (2004) 32 Cal.4th 1048, 1063, quoting *People v. King* (1993) 5 Cal.4th 59, 78; *People v. Newman* (2015) 238 Cal.App.4th 103, 112-113 [defendant may be punished separately for an act of violence against two or more persons]; *People v. Masters* (1987) 195 Cal.App.3d 1124, 1128 [section 654's prohibition against multiple punishment not applicable when violent crimes involve different victims].) Nor do the limitations apply when the second conviction follows a different intent and objective than the first conviction. (See *People v. Rodriguez* (2009) 47 Cal.4th 501, 507.)

Here, section 654 does not apply because the convictions were for unrelated murders that occurred two years apart. Thus, the trial court did not have discretion to stay the sentence on count 2 pursuant to section 654. This was not a clerical error. The court stated that the total prison commitment was life without the possibility of parole for count 1, consecutively followed by 50 years to life for the two firearm enhancements.

The court's failure to include the additional 15 years to life for count 2 erroneously applied section 654.[4]

Fontenot argues that to the extent the decision to stay the sentence for count 2 was discretionary, the People waived the right to challenge that choice on appeal but fails to provide any explanation of how the stay could have been based on discretion. "It is well settled . . . that the court acts in 'excess of its jurisdiction' and imposes an 'unauthorized' sentence when it erroneously stays or fails to stay execution of a sentence under section 654." (*People v. Scott* (1994) 9 Cal.4th 331, 354, fn.17.) A challenge to an unauthorized sentence is not waived by the People. (See *id.* at p. 354.)

Additionally, as discussed *ante*, the sentence for the firearm enhancement under section 12022.53, subdivision (d) must be reconsidered in light of the court's newly-acquired discretion. (See § 12022.53, subd. (h); *Chavez, supra*, 22 Cal.App.5th at p. 712.) Accordingly, if the juvenile court deems the transfer of count 2 to the criminal court appropriate, we remand the matter to the trial court for resentencing of count 2.

E. Parole Restitution Fine

Fontenot contends the parole restitution fine was improperly applied to count 2 because the sentence of life without the possibility of parole on the first count left no opportunity for parole. The Attorney General contends that the court may consider each

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[4] Even had the stay been properly applied to the sentence, the inclusion of time for the corresponding firearm enhancement in the total time was not proper. When the sentence for the substantive offense is stayed, any accompanying enhancement must also be stayed. (*People v. Calles* (2012) 209 Cal.App.4th 1200, 1221; *People v. Guildford* (1984) 151 Cal.App.3d 406, 412 ["[I]f the stay of the sentence for the base term becomes permanent, time for that enhancement, by definition, will never be served."].)

sentence separately and apply the parole restitution fine to any count that leaves an opportunity for parole.

Section 1202.45 requires a court to assess a parole restitution fine when it imposes a restitution fine pursuant to section 1202.4, subdivision (b). The parole revocation restitution fine is suspended unless the parole is revoked. (§ 1202.45.) A parole restitution fine does not apply to a sentence to life without the possibility of parole. (*People v. Jenkins* (2006) 140 Cal.App.4th 805, 819.)

Fontenot relies on *People v. Oganesyan* (1999) 70 Cal.App.4th 1178 (*Oganesyan*) to argue the court improperly imposed a parole restitution fine. In *Oganesyan,* the defendant challenged the imposition of the fine. (*Id.* at p. 1184.) The defendant had been sentenced to life in prison without the possibility of parole for a special circumstances first degree murder conviction with a firearm enhancement, and to a second sentence of 15 years to life for second degree murder plus an additional firearm enhancement. (*Ibid*.) The court explained that "the overall sentence is the indicator of whether the additional restitution fine is to be imposed," and it concluded that because the sentence did not allow for parole, no additional restitution fine should have been imposed. (*Id.* at p. 1185.) Additionally, the court explained the purpose of section 1202.45 was to recoup restitution costs, and when a special circumstance murder sentence eliminates an option for parole, that purpose is not advanced. (*Oganesyan,* at p. 1185.)

The Attorney General relies on *People v. Brasure* (2008) 42 Cal.4th 1037 (*Brasure*) to argue the sentences for each count should be evaluated separately to determine the applicability of the parole restitution fine. In *Brasure,* the defendant was

sentenced to death and to a determinate sentence (§ 1170), which included the possibility of parole (§ 3000, subd. (a)(1)), and the court imposed a suspended parole restitution fine. (§ 1202.45; *Brasure, supra*, 42 Cal.4th at p. 1075.) *Brasure* distinguished itself from *Oganesyan, supra*, 70 Cal.App.4th 1178 and held that section 1202.45 parole revocation fines should be included when a sentence includes a determinate prison term, even if the determinate sentence is in addition to a life sentence without the possibility of parole. (*Id.* at p. 1075.)

Both *Oganesyan* and *Brasure* had *some* possibility of parole, but it was more remote in *Oganesyan* than in *Brasure* because the second sentence in *Oganesyan* was indeterminate, while it was determinate in *Brasure*. (See *Oganesyan*, *supra*, 70 Cal.App.4th at p. 1185.) Taken together, *Oganesyan* and *Brasure* instruct us that a trial court should consider the overall sentence; when there is a sentence of life without the possibility of parole and a consecutive indeterminate sentence, no parole restitution fine is necessary. (*Oganesyan, supra*, at p. 1185.) However, when the second sentence is a determinate sentence, a parole restitution fine is required. (*Brasure, supra,* 42 Cal.4th at p. 1075.)

The present case is nearly identical factually to *Oganesyan, supra*, 70 Cal.App.4th 1178: Fontenot was sentenced to life without the possibility of parole, then a consecutive sentence of 25 years to life for the firearm enhancement, then another indeterminate sentence of 15 years to life for the second count and 25 years to life for the related firearm enhancement. Even though a period of parole applies to indeterminate sentences under section 1168, as the Attorney General points out, because the overall

sentence does not include a determinate term here, there is no requirement that the parole restitution fine be imposed. (See *ibid.*) Thus, if the juvenile court determines it would have transferred the matter to criminal court, the parole restitution fine must be removed.

However, if the juvenile court retains jurisdiction over count 2, the special circumstance warranting a sentence of life without the possibility of parole will no longer apply. Thus, if the court resentences Fontenot on count 1 to a lesser sentence, it need not remove the parole restitution fine.

F. Corrections to Abstract of Judgment

The parties agree the abstract of judgment incorrectly identifies the dates of the offense in count 2 the date of the conviction on count 2. On remand, these errors should be corrected to reflect that the offense in count 2 occurred in 2009 and the conviction for count 2 occurred September 18, 2016.

DISPOSITION

The judgment of the criminal court on count 2 is conditionally reversed and the matter remanded to the juvenile court with directions to conduct a transfer hearing pursuant to Welfare and Institutions Code section 707 no later than 90 days from the filing of the remittitur.

If, at the transfer hearing, the juvenile court determines that it would have transferred Fontenot to a court of criminal jurisdiction, the judgment shall be reinstated as of that date. The trial court is then directed to conduct a resentencing hearing on count 2 and to consider its discretion under section 12022.53, subdivision (h), regarding the

firearm enhancement as to both counts. The trial court is also directed to remove the parole restitution fine.

If, at the transfer hearing, the juvenile court determines that it would *not* have transferred count 2 to a court of criminal jurisdiction, then Fontenot's criminal conviction for count 2 and true finding on the related firearm enhancement will be deemed juvenile adjudications as of that date. The juvenile court is then to conduct a dispositional hearing within its usual time frame. The trial court is then directed to conduct a resentencing hearing on count 1 consistent with this opinion, and to exercise its discretion under section 12022.53, subdivision (h), regarding the firearm enhancement.

Following the hearings on remand, the clerk of the superior court is instructed to prepare amended abstracts of judgment reflecting the trial court's sentencing decisions and the corrections discussed in this opinion, and to serve certified copies on the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

O'ROURKE, J.

DATO, J.